

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Application by SBC Communications Inc.,
Southwestern Bell Telephone Company,
And Southwestern Bell Communications
Services, Inc. d/b/a Southwestern Bell
Long Distance for Provision of In-Region
InterLATA Services in Texas

BUCKET FILE COPY ORIGINAL

CC Docket No. 00-65

APR 26 2000

RECEIVED
OFFICE OF THE SECRETARY

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for Sprint
Communications Company L.P.

Dated: April 26, 2000

No. of Copies rec'd
List ABOVE

045

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INTRODUCTION AND SUMMARY	2
I. SWBT DOES NOT PROVIDE UNBUNDLED LOOPS ON A NONDISCRIMINATORY BASIS.	8
A. xDSL Loops.	8
1. SWBT Has Failed To Provide Nondiscriminatory Access To Unbundled xDSL-Capable Loops.	10
2. SWBT's Advanced Services Affiliate Is Not Fully Operational Nor Can It Substitute For Nondiscriminatory Provision Of Unbundled xDSL Loops.	19
3. SWBT's Reliance On The Covad/Rhythms Arbitration Award For Demonstrating That It Provides xDSL Loops On A Nondiscriminatory Basis Is Premature.	23
B. SWBT Does Not Provide Coordinated Cutovers In A Manner That Allows An Efficient Competitor To Compete.	26
1. The Reliability Of SWBT's Data Has Been Called Into Question.	26
2. SWBT's Hot Cut Performance Does Not Meet The Standard Articulated In The <u>New York Order</u>	28
II. SWBT FAILS TO PROVIDE NONDISCRIMINATORY ACCESS TO SIGNIFICANT OSS FUNCTIONALITIES	38
A. The December 1999-February 2000 Data Submitted By SWBT Confirms The SWBT OSS Problems Identified By Sprint In Its Petition.	38
B. SWBT's Demonstration As To OSS Integration Is Insufficient.	44
III. SWBT FAILS TO PROVIDE NONDISCRIMINATORY ACCESS TO INTERCONNECTION TRUNKS ON A CONSISTENT BASIS.	45
IV. SWBT'S APPLICATION IS NOT IN THE PUBLIC INTEREST.	47
CONCLUSION.....	51

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Application by SBC Communications Inc.,)	CC Docket No. 00-65
Southwestern Bell Telephone Company,)	
And Southwestern Bell Communications)	
Services, Inc. d/b/a Southwestern Bell)	
Long Distance for Provision of In-Region)	
InterLATA Services in Texas)	

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby petitions the Commission to deny the above-captioned application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (together "SWBT"). Sprint previously filed a Petition to Deny¹ and Reply Comments concerning SWBT's first section 271 application in Texas (CC Docket No. 00-4). Sprint does not reiterate the points it made in those filings; nevertheless, it stands by its previous assessments and understands that the Commission will duly consider all the arguments it has raised.²

¹ See Petition to Deny of Sprint Communications Company L.P., In re Application by SBC Communications et.al. for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-4 (filed Jan. 31, 2000) ("Petition").

² See Public Notice, DA 00-750 (rel. April 6, 2000).

INTRODUCTION AND SUMMARY

SWBT's recent filing to supplement its first section 271 application to provide in-region, interLATA service in Texas³ fails to rectify the broad spectrum of performance problems raised by parties in the first proceeding, and SWBT continues to fall short of meeting several key section 271 checklist obligations. Indeed, the Supp. Letter is little more than an effort to re-argue the checklist issues that SWBT has failed to satisfy. As demonstrated below, the data available since the first application confirms that SWBT does not meet the mark on these checklist items. In fact, most of the performance measures that SWBT failed to meet in its first application are still well-below par in this second application. The Supp. Letter either ignores, excuses, or gives short shrift to these failures and points to other measures upon which it rests its claim of compliance. However, SWBT's arguments fail to carry its burden of demonstrating compliance with the 271 checklist. Consequently, the Commission must deny its application.

Taking a step back from the performance issues in the Supp. Letter, SWBT's approach to the 271 process is fundamentally flawed. Both applications were incomplete and premature. SWBT's application should not be filed until it can demonstrate in a commercial context that its systems can handle commercial volumes in a nondiscriminatory manner. SWBT's systems fall far short of this standard.

The Supp. Letter focuses on certain issues related to the nondiscriminatory provision of xDSL loops, hot cuts, and OSS. This Petition to Deny focuses on the issues addressed by the Supp. Letter. SWBT claims that it can fulfill the checklist requirement to offer nondiscriminatory

³ See Letter of James D. Ellis, representing SWBT, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4, (April 5, 2000) ("Supp. Letter").

xDSL-capable loops through its performance data. See Supp. Letter at 11. However, based on the six months of data submitted by SWBT, it does not meet its burden of demonstrating that it can provide xDSL-capable loops on a nondiscriminatory basis.

SWBT has failed to demonstrate that its pre-ordering and ordering processes for xDSL loops are adequate. In fact, the performance measurement which will help determine whether SWBT provides timely Firm Order Confirmations to CLECs was just implemented in March, and SWBT currently has no data regarding that measurement. In addition, SWBT has not provided timely conditioned xDSL loop installations on a consistent basis, and its performance for several key performance measures relating to the delay of installation due dates are out of parity. SWBT claims that performance in these areas will improve when it institutes line sharing for CLECs. But promises of future performance are irrelevant to this proceeding, since an application must be complete when filed to pass section 271 muster. In any event, this argument is unavailing because many CLEC xDSL services require a separate unbundled loop and cannot line share. Similarly, SWBT's argument that the loop discounts required by the SBC/Ameritech Merger Order⁴ make up for its poor performance is irrelevant. The SBC/Ameritech Merger Order specifically states that the conditions imposed were intended to address the potential harms caused by the merger; they were not intended to address the criteria for BOC entry into the interLATA market and cannot substitute for performance.

SWBT's trouble report rates for unbundled xDSL loops also are consistently out of parity. SWBT asserts that CLECs cause these trouble reports by using "non-standard service

⁴ Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control, 14 FCC Rcd 14712 (1999) ("SBC/Ameritech Merger Order").

arrangements." Moreover, SWBT argues that CLECs are promising customers more than their xDSL services can deliver and filing unfounded trouble reports in order to blame SWBT for the CLEC's failure. This would hardly seem a sound business approach for a new entrant trying to convince customers that it can deliver high quality service. Whoever is blamed -- and the customer is going to blame the CLEC because the CLEC is offering the service desired by the customer -- the customer will be dissatisfied.

Nor can SWBT claim that its failure to provide nondiscriminatory access to unbundled xDSL loops is excused by the nascent nature of this wholesale service. The provision of xDSL loops is not nascent in Texas as it was in New York. The Commission has six months of data by which to determine whether SWBT provides nondiscriminatory access to xDSL-capable loops, and SWBT has deployed twice as many xDSL loops as Bell Atlantic in New York when the FCC approved its application. In any event, SWBT must not be allowed to benefit from a nascency argument when its abuse during the discovery process in the Covad/Rhythms arbitration had the effect of delaying xDSL competition in Texas.

Moreover, contrary to its request, SWBT should not be permitted to rely on a separate advanced services subsidiary for purposes of demonstrating the provision of xDSL-capable loops on a nondiscriminatory basis. Most fundamentally, SWBT provides several advanced services that are competitive with CLEC advanced services, such as ISDN and DS1, outside of SWBT's advanced services affiliate, ASI. Specifically, ASI provides ADSL which can line share and does not require unbundled xDSL loops to offer these services. If ASI does not have to use the same inputs as CLECs, it will be futile to rely upon it to ensure nondiscrimination. Thus, SWBT should not be permitted to rely upon it as a means to offer nondiscriminatory service to CLECs.

Furthermore, SWBT has not fully implemented the Covad/Rhythms arbitration award which, "in the Texas PUC's view . . . provide data CLECs nondiscriminatory access to unbundled loops." See Supp. Letter at 15. Without such full implementation, nondiscrimination in the provision of xDSL-capable loops cannot be attained.

As for the provision of voice loops, SWBT continues to fail to provide hot cuts in a manner that allows efficient entrants the opportunity to compete. The hot cut data submitted by SWBT does not meet the performance standards articulated in the New York Order⁵ or the benchmarks established by the TPUC on a consistent basis. SWBT's hot cut outages are far in excess of the five percent standard in the New York Order for frame due time ("FDT") hot cuts which SWBT encourages CLECs to use for loop cutovers involving fewer than 20 lines. SWBT argues that CLECs may use the coordinated hot cut method ("CHC") for any order (regardless of the number of lines) to avoid FDT service outages; however, SWBT has not demonstrated that the CHC method consistently meets the New York Order standard, and SWBT has encouraged CLECs to use the FDT method. Cutovers that are plagued by service outages are a detriment to CLECs and their reputations.

Likewise, CLECs report troubles within 10 days for both FDT and CHC cutovers at a rate that generally exceeds the two percent benchmark set in the New York Order (which is the same as the TPUC's benchmark). In fact, over the last three months, SWBT did not meet this benchmark once for FDT orders, and it failed to meet this benchmark for CHC orders in the last

⁵ In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (rel. Dec. 22, 1999) ("New York Order").

reported month. Similarly, SWBT's cutover timeliness is inconsistent and frequently fails to meet the TPUC's benchmark. While SWBT has argued that it, in any event, meets the standard for cutover timeliness that the Commission applied to Bell Atlantic in New York, this is not so. Consequently, SWBT has not proven that it provides nondiscriminatory access to loops as required by the section 271 checklist.

SWBT also fails to provide CLECs with nondiscriminatory access to other aspects of its operations support systems ("OSS"). Sprint demonstrated in its Petition that a very large percentage of CLEC orders sent over SWBT's Electronic Data Interchange ("EDI") and LSR Exchange System ("LEX") interfaces are rejected, and SWBT has not improved this poor performance. Indeed, EDI reject rates appear to have reached a plateau in the mid-20% range, while LEX rejections hover near 40%. Reject rates of this magnitude will not permit viable competition.

SWBT defends this poor performance by claiming that the reject rates include rejects that are caused by CLECs, but does not demonstrate that eliminating CLEC-caused rejects would demonstrate nondiscrimination. Similarly, SWBT is wrong when it suggests that CLECs are capable of achieving low reject rates; rather, the data for SWBT's best-performing CLEC is quite close to the average for all CLECs. This strongly suggests that SWBT's performance is the primary factor driving rejects; if CLECs were primarily at fault, one would expect much greater disparity between the average performance and the best performance.

Finally, SWBT states that its poor performance on EDI rejects is belied by its reportedly high EDI flow-through rate. However, SWBT's EDI flow-through measurement excludes LSRs that are rejected due to what SWBT considers to be CLEC error, but SWBT does not

demonstrate that its calculation is accurate or even objective so as to prove that LSRs are rejected due to the fault of CLECs.

Other OSS performance measure failures identified by Sprint in its Petition also continue to indicate a lack of nondiscriminatory treatment. First, SWBT failed to meet the benchmark for the percentage of SORD manual rejects returned within five hours of receiving the LSR by a very wide margin for the months of December 1999 through February 2000. Second, SWBT also failed to meet the benchmark for the mean time to return manual rejects caused by SORD edits for LEX or EDI orders in each month from December 1999 through February 2000. Finally, SWBT continues to be unable to provide timely Firm Order Commitments ("FOCs") for unbundled loop orders of one to 50 loops, and has failed to meet parity in each month from December 1999 through February 2000.

There also remains serious doubt as to whether SWBT's pre-ordering and ordering interfaces and functionalities can be fully integrated. Parties to this proceeding have explained that integration cannot be complete where the addresses in the SWBT pre-ordering databases conflict with those in the ordering databases. Such an inconsistency will result in the rejection of an otherwise valid LSR. It does not appear that SWBT has fixed this problem since its original filing. SWBT has submitted letters from two CLECs stating that they have achieved some degree of integration. However, both of these CLECs state that they continue to experience rejections caused by problems with "address validation" functionalities, indicating that SWBT still has not solved the problem of mismatches in its pre-ordering and ordering databases.

In addition to problems with loops and OSS, SWBT does not consistently provide interconnection trunks on a nondiscriminatory basis to competitors. SWBT continues to have

problems with trunk blockage and missed due dates for installation of trunks in Houston.

Moreover, it has failed to meet the benchmark for trunk installation intervals for two of the last three months statewide. Given the critical importance of interconnection trunks to CLECs, SWBT must demonstrate a consistent and sustained showing of nondiscriminatory access before section 271 authority may be granted.

Because SWBT fails to meet all the checklist requirements in section 271, grant of the application is not in the public interest, and it must be denied.

I. SWBT DOES NOT PROVIDE UNBUNDLED LOOPS ON A NONDISCRIMINATORY BASIS.

A. xDSL Loops.

The Supp. Letter abandons SWBT's specious effort to demonstrate adequate xDSL loop provisioning based upon the flawed Telcordia testing.⁶ See Petition at 32-34. But, SWBT's

⁶ Nor does SWBT argue in the Supp. Letter that the last minute "commitments" made to the TPUC with regard to the provision of xDSL unbundled loops support grant of the application. However, the Chapman/Dysart Supp. Aff. does make the claim that SWBT has implemented the xDSL commitments. See Chapman/Dysart Supp. Aff. ¶¶ 71-90. In its Petition, Sprint argued, *inter alia*, that SWBT had not reduced these "commitments" to legal obligations memorialized in PUC approved interconnection agreements. See Petition at 40-42. For three of these commitments, SWBT still has not demonstrated that "it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement." Application of Bell South Corp. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, ¶ 54 (1998) ("Second Louisiana Order"). These three commitments are : (1) to use a two-step process whereby CLECs can acquire loop qualification information prior to ordering a loop; (2) for loops under 12,000 feet and designated "green" by SWBT's pre-qualification tool, to immediately commence the provisioning process once it receives a valid CLEC LSR; and (3) to offer all CLECs a three-day UNE training seminar (up to six employees at no charge), four hours of which will specifically address pre-ordering, ordering, and provisioning of xDSL-capable loops. See Attachment to Letter of Austin C. Schlick, representing SWBT, to Magalie Roman Salas, Secretary, FCC (March 10, 2000) (referencing only the Chapman Affidavit, and not an interconnection agreement, as the document evidencing SWBT's "implementation" of these commitments.).

attempt to demonstrate nondiscriminatory xDSL provisioning is otherwise unimproved. SWBT now claims that its performance data, its implementation of the Covad/Rhythms arbitration award, and its establishment of an advanced services affiliate demonstrate such compliance. As set forth below, none of these arguments can sustain the burden placed upon it by SWBT.

As a backstop for its performance failures, SWBT asserts that its application should be approved without specific consideration of its xDSL performance because the provision of xDSL loops is nascent when compared to the total number of unbundled loops provisioned by SWBT. See Supp. Letter at 11-15; see also Brown Supp. Aff. ¶¶ 2-6. This claim must be rejected as contrary to the facts and policy. The provision of unbundled xDSL loops is hardly nascent today. SWBT claims to have "provisioned approximately 5000 local loops for xDSL providers in Texas since August 1999,"⁷ or "twice as many DSL loops as Bell Atlantic had deployed in New York when the FCC approved its application,"⁸ notwithstanding (of course) SWBT's poor performance in provisioning those loops. Moreover, SWBT has filed with the FCC six months of data on xDSL provisioning since September 1999, when SWBT acknowledges that CLECs began requesting xDSL loops in a "significant quantity." SWBT First 271 Application Br. at 39. Demand for xDSL-capable loops is now clearly beyond the "nascent" stage in Texas, and the time has clearly arrived for nondiscriminatory access to this important unbundled network element. In any event, SWBT is estopped from avoiding consideration of its poor xDSL provisioning performance in light of SWBT's determined efforts to slow-roll the availability of xDSL loops in Texas. See Petition at 44-49. Thus, the Commission must reject SWBT's claim that xDSL must

⁷ Supp. Letter at 11.

⁸ Chapman/Dysart Supp. Aff. ¶ 5.

continue to be treated as a "nascent" service, and rigorously examine SWBT's performance in provisioning xDSL loops.

1. SWBT Has Failed To Provide Nondiscriminatory Access To Unbundled xDSL-Capable Loops.

Sprint identified SWBT's provisioning of xDSL loops as a substantial shortcoming in SWBT's first Texas 271 application, even based on the limited data then available. See Petition at 32-36. Data on xDSL provisioning is now available for the months of December 1999 through February 2000, and it is now more clear than ever that SWBT's performance falls substantially short of the legal standard. This conclusion holds true for essentially the entire xDSL unbundled loop provisioning process, from preordering to ordering to installation to trouble reports. SWBT simply is not providing CLECs with a meaningful opportunity to compete for the provisioning of xDSL loops. SWBT's performance failures for pre-ordering and ordering, provisioning, and the quality of xDSL-capable loops are discussed below.

Before proceeding to an examination of SWBT's performance data, it is important to understand that both CLECs and the DOJ have called into question the reliability of the data reported by SWBT for xDSL-capable loops. For example, the DOJ states that "a large percentage of DSL orders are not being tracked in the average installation measure (PM 55.1)." DOJ March 20 Letter at 3. More generally, Covad states that the TPUC did not request Covad's data to conduct its "independent evaluation" of SWBT's performance for xDSL loops from November 1999 to January 2000, notwithstanding Covad's evidence filed in this proceeding showing that SWBT's performance data excluded "giant swaths of Covad orders."⁹ In light of

⁹ See Letter of Thomas M. Koutsky, representing Covad, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 at 5 (Mar. 1, 2000) ("Covad March 1 Letter").

this evidence, this Commission can have little confidence that the performance data reported by SWBT is reliable.

Pre-ordering and Ordering. SWBT's inability to provide adequate performance in provisioning xDSL loops begins in the pre-ordering and ordering processes. In response to criticism from the DOJ and CLECs, SWBT began in January 2000 to capture the entire loop qualification interval, that is the entire time between SWBT's receipt from the CLEC of a loop information request and the return of that information to the CLEC (PM 57-01), for its measurement of the average response time for providing loop make-up information to CLECs.¹⁰ See Chapman/Dysart Supp. Aff. ¶ 28. While SWBT met the parity standard for this new performance measure in January, it failed to do so in February. See id.; see also SWBT March 23 Letter, Texas Aggregated Performance Measures at 6. The Commission cannot be confident that SWBT can provide CLECs with loop make-up information in a timely fashion where there is data on this measurement for only two months, one of which shows a failure to meet the relevant standard.

In response to criticism from the DOJ and CLECs, SWBT will report on the timeliness of its delivery of Firm Order Confirmations ("FOCs") in connection with xDSL loop orders beginning with the March 2000 performance results. See Chapman/Dysart Supp. Aff. ¶ 29. SWBT had not previously reported any information regarding FOC timeliness. The new FOC performance measure is particularly important because SWBT's installation performance measures

¹⁰ The previous performance measure only tracked "the time the SBC representative worked on the request and exclude[d] both the period of time the request was with SBC before the representative started working on it and the period of time the response remained with SBC after the representative's work was completed." DOJ Eval. at 12-13.

(such as compliance with due dates) are all triggered by the promised due date contained in the FOC.¹¹ However, it is plain that data from this important performance measure is not available to allow the Commission to assess SWBT's performance. Moreover, CLECs have raised serious questions as to the TPUC's implementation of this performance measure, asserting that the TPUC is allowing SWBT to measure the FOC interval beginning only after the loop qualification process is concluded.¹²

Timeliness of Installations. SWBT leans heavily upon its performance with regard to PM 55.1-01, average completion interval for loops not requiring conditioning, and PM 55.1-02, average completion interval for loops requiring conditioning, claiming that it provisioned loops without conditioning at parity with retail for five months from October 1999 to February 2000, and in two of the last three months for loops with conditioning.¹³ However, SWBT's performance for loops with conditioning (PM 55.1-02) was quite substantially out of parity in both October and November 1999,¹⁴ as well as in January of 2000.¹⁵ SWBT tries to excuse this performance by arguing that its charges for line conditioning have understated demand for its service, thereby

¹¹ See Covad March 1 Letter at 1.

¹² See *id.*; see also Chapman/Dysart Supp. Aff., Attachment A at A-1.

¹³ Sprint notes that the DOJ has informed the Commission that "a large percentage of DSL orders are not being tracked" by PM 55.1. See DOJ March 20 Letter at 3. Thus, the reliability of PM 55.1 is highly questionable.

¹⁴ See SWBT Feb. 11 Letter, Texas Aggregated Performance Measures at 6 (October -- 16.4 days for CLECs versus 9.5 days for SWBT); see also SWBT Feb. 18 Letter, Texas Aggregated Performance Measures at 5 (November -- 19.3 days for CLECs versus 11.5 days for SWBT).

¹⁵ In January, SWBT's performance for CLECs was 20.4 days versus 15 days for itself. See SWBT Feb. 18 Letter, Texas Aggregated Performance Measures at 5.

limiting the number of its customers that seek to use conditioned xDSL loops. See Supp. Letter at 12 and Chapman/Dysart Supp. Aff. ¶ 24. This is no reason to excuse SWBT's performance. Indeed, it is cause for concern because it shows that by insisting on high loop conditioning charges for its own customers, SWBT can suppress demand for its own services which, in turn, gives it the opportunity to degrade service to CLECs without significantly impacting its own service to its retail customers. In other words, by limiting the number of SWBT customers who rely on conditioned xDSL loops, while CLEC customers rely on such loops to a far greater extent, SWBT can harm a significant number of CLEC customers by providing uniformly poor service for conditioned xDSL loops with little damage to its own business interests.

Most importantly, while the average completion interval is an important measure of timeliness, it cannot substitute for performance with regard to missed due dates. It is of little benefit to the CLEC that its average installation interval is equal to SWBT's if SWBT nonetheless misses the due date. A missed due date significantly undermines end-user confidence in the CLEC. Thus, even if SWBT performed perfectly with regard to average completion interval, its performance could still constitute an effective entry barrier if SWBT fails to meet due dates. As shown below, SWBT's due date performance is lacking and does not provide a meaningful opportunity for CLECs to compete.

As conceded in the Chapman/Dysart Supp. Aff., SWBT performance for several key performance measures relating to due dates is out of parity. See Chapman/Dysart Supp. Aff. ¶ 35. Specifically, SWBT missed due dates for DSL (PM 58-09) is out of parity by a wide margin for all months from September 1999 to February 2000,¹⁶ as is SWBT missed due dates due to

¹⁶ PM 58-09 measures missed due dates in the aggregate for all DSL loops for any reason. In September, SWBT missed 15.8% of CLEC due dates versus 4.1% of its own due dates.

lack of facilities ("LOF") for DSL (PM 60-08) from October 1999 to February 2000.¹⁷ SWBT is also out of parity for average delay days for missed due dates for DSL (PM 62-09) for December 1999 through February 2000.¹⁸ These substantial failures clearly indicate that CLECs do not have a meaningful opportunity to compete using unbundled xDSL-capable loops.

SWBT tries to explain away this very poor performance record, but its explanations are completely unpersuasive. SWBT argues that these performance measures suffer from an "apples-to-oranges" comparison problem; specifically, SWBT's xDSL services are in fact ADSL services that rely on line sharing, not unbundled loops, whereas the CLECs' xDSL services cannot rely on line sharing (because SWBT has not yet made it available to third parties). See Supp. Letter at

In October, SWBT missed 9.4% of CLEC due dates versus 3.4% of its own due dates, and in November, SWBT missed 10.1% of CLEC due dates versus 4.4% of its own due dates. See SWBT Feb. 11 Letter, Texas Aggregated Performance Measures at 7; see also SWBT Feb. 18 Letter, Texas Aggregated Performance Measures at 6. In December, SWBT missed 12.1% of CLEC due dates versus 6.3% of its own. In January, SWBT missed 15.5% of CLEC due dates versus 7.6% of its own due dates; and in February, SWBT missed 16% of CLEC due dates versus 5.7% of its own. See SWBT March 23 Letter, Texas Aggregated Performance Measures at 6.

¹⁷ SWBT's performance for PM 60-08 -- missed due dates due to the lack of facilities -- was as follows: in October 3.9% for CLECs versus 1% for itself; in November 4% for CLECs versus 1.1% for itself; in December 6.7% for CLECs versus 0.6% for itself; in January 8.6% for CLECs versus 0.6% for itself; and in February 11.6% for CLECs versus 0.4% for itself. See SWBT Feb. 11 Letter, Texas Aggregated Performance Measures at 7; see also SWBT Feb. 18 Letter, Texas Aggregated Performance Measures at 6; see also SWBT March 23 Letter, Texas Aggregated Performance Measures at 7.

¹⁸ In December, the average delay days for CLECs was 6.3% for CLECs versus 4.1% for SWBT. See SWBT Feb. 18 Letter, Texas Aggregated Performance Measures at 7. In January, the average delay days for CLECs was 10.1% versus 6.4% for SWBT; and in February, the average delay days for CLECs was 7.1% versus 4.8% for SWBT. See SWBT March 23 Letter, Texas Aggregated Performance Measures at 7.

12-13; see also Chapman/Dysart Supp. Aff. ¶ 32. SWBT claims that once CLECs can use line sharing this performance problem will be alleviated. See Supp. Letter at 13.

The Commission should reject this flawed reasoning; indeed, SWBT has rejected this reasoning itself. As pointed out by the DOJ,¹⁹ the business rule for PM 58 calls for a comparison of xDSL service to CLECs with SWBT's provision of DS1 service to its customers. See Dysart Aff., Attachment A at 94-95. SWBT claims that this is a "typographical error" and that the correct comparison is with its ADSL service. See SWBT March 8 Letter at 3 (List of Prior Corrections to Information Filed With the Commission in this Proceeding). According to that letter, comparison to ADSL is a "logical comparison [that] accords with the comparison used in Performance Measure 55.1." Id. This statement effectively concedes that comparison to ADSL is the proper comparison; therefore, SWBT apparently does not really believe that comparing its ADSL service to its provision of xDSL loops for CLECs is an "apples-to-oranges" comparison. Moreover, SWBT further concedes that the availability of line sharing to third parties will not alleviate the performance problems it is facing for many CLEC xDSL services because they mainly offer services which require a separate unbundled loop and cannot share lines.²⁰ Thus,

¹⁹ See DOJ March 20 Letter at 3, n.8.

²⁰ The Commission acknowledged this fact in its recent Line Sharing Order. See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 98-147 and 96-98, 14 FCC Rcd 20912, ¶ 27, n. 51 (1999). Specifically, the Commission stated that "[s]ome xDSL technologies can 'share lines' with voice service, because they do not use the frequencies in or immediately above the voiceband, thus ensuring compatibility with concurrent voiceband traffic. Not every xDSL technology, however, can be used for line sharing. HDSL and SDSL, for example, utilize voiceband frequencies, and thus are not acceptable for deployment in a shared line." Id.

even after line sharing is available to CLECs, parity performance by SWBT with regard to line sharing provisioning cannot and should not substitute for performance with regard to the provisioning of unbundled xDSL loops.

SWBT offers two further arguments in an effort to escape the result of its failure to perform as required. First, SWBT claims that it failed to meet the required due dates either because it lacked the necessary facilities to complete the order (including instances in which a line was available but required repair),²¹ or because the due dates selected by the CLECs, while consistent with the business rules, do not account for the already busy schedules of SWBT's technicians. See Chapman/Dysart Supp. Aff. ¶ 40. These "explanations" do not justify SWBT's poor performance. Again, the TPUC has determined that these are the performance measures that SWBT must meet to demonstrate that it is providing a meaningful opportunity to compete. These "explanations" merely describe the types of obstacles that SWBT must overcome if it is to provide such an opportunity. The solution to the problems identified by SWBT is to hire more technicians, repair its lines, and otherwise begin to behave like a provider of services to customers in a competitive market.

SWBT also urges the Commission to excuse its poor performance in xDSL loop provisioning because CLECs can obtain such loops at a discount pursuant to the SBC/Ameritech Merger Order, because CLECs can select an earlier due date than that available from SWBT retail, and because CLECs can collect fines from SWBT for performance failures under the TPUC-approved performance plan. See Supp. Letter at 13. These suggestions simply cannot be entertained. Reliance on the xDSL loop discount is contrary to the SBC/Ameritech Merger

²¹ See Chapman/Dysart Supp. Aff. ¶ 35-39.

Order. In that decision, the Commission repeatedly stated that the conditions were not to be used to satisfy or displace the SBC's obligations under Sections 251, 252 or 271 of the Act. See SBC/Ameritech Merger Order ¶ 511. The Commission specifically stated that "the conditions that we adopt today are in no way intended to define what is required under, for example, 251 or 271, and SBC/Ameritech's compliance with these conditions does not signify that it will satisfy its nondiscrimination obligations under the Act or Commission rules".²² Indeed, in approving the merger notwithstanding its concerns, the Commission reasoned that local competition would serve as "the one sure remedy" for SWBT's threatened misconduct. Id. ¶ 230 (emphasis added). In other words, in approving the merger, the Commission recognized that it would be that much more important to ensure that the market opening conditions of section 271 are in fact met.

In any event, a discount on an xDSL loop is no cure for the harm to the CLEC that will result if the loop is provisioned late or is of poor quality, events that are all too likely given the analysis set forth above. Similarly, the ability of a CLEC customer to select an earlier due date is hardly helpful if SWBT is likely to miss that earlier date and thereby harm the competitive interests of the CLEC. Finally, penalties are also no substitute for performance by SWBT that provides a meaningful competitive opportunity. As stated by TPUC Commissioner Walsh, ". . . The CLECs need parity, not penalties." 11/4/99 Open Mtg. Tr. at 20-21.

Trouble Reports. For PM 65-08, the trouble report rate for unbundled xDSL loops, SWBT is out of parity for December 1999 (7.7% for CLECs versus 4.6% for SWBT) and

²² The Order expressly provided that the expiration of a merger condition could not be used in the public interest evaluation of an SWBT 271 application. SBC/Ameritech Merger Order, Appendix C at 15039. A fortiori, the existence of a condition prior to its expiration must be deemed equally irrelevant.

January 2000 (6.3% for CLECs versus 4.7% for SWBT),²³ and CLECs reported more trouble reports than SWBT in February as well.²⁴ SWBT attempts to excuse this poor performance by claiming that the average of the last six months was very close (5.5% for CLECs versus 5.6% for SWBT). See Chapman/Dysart Supp. Aff. ¶ 26. This argument is unavailing. An average of trouble report rates over a six month period simply does not demonstrate that SWBT is providing a meaningful opportunity to compete on a consistent basis, particularly where its performance is poor in two out of the last three months.

Perhaps even more importantly, SWBT's installation quality for xDSL loops provisioned is quite poor, as demonstrated by the percentage of loops for which trouble reports are issued within 30 days (PM 59-08). Indeed, SWBT has been out of parity for this performance measure from December 1999 to February 2000.²⁵ Trouble reports are issued on CLEC unbundled xDSL loops within 30 days of installation practically twice as often as trouble reports are issued for SWBT. See id. SWBT tries to blame this performance on the CLECs, asserting that CLECs cause these trouble reports by using "non-standard service arrangements"²⁶ and thereby attempt to push xDSL loops beyond their physical capabilities. See Chapman/Dysart Supp. Aff. ¶ 41. Similarly, SWBT

²³ See SWBT March 23 Letter, Texas Aggregated Performance Measures at 8.

²⁴ See id. CLECs submitted trouble reports for 4.6% of xDSL unbundled loops in February 2000 versus 4.3% for SWBT.

²⁵ SWBT's performance for PM 59-08 -- the percentage of trouble reports received within 30 days -- was as follows: in December 11.9% for CLECs versus 5.2% for itself; in January 9% for CLECs versus 4.9% for itself; and in February 8.7% for CLECs versus 4.1% for itself. See SWBT March 23 Letter, Texas Aggregated Performance Measures at 6.

²⁶ Supp. Letter at 13.

argues that CLECs cause these trouble reports by promising customers more than their xDSL services can deliver. See id. ¶ 42. Sprint respectfully submits that these arguments are unsupported and not realistic. SWBT does not demonstrate that eliminating trouble reports resulting from CLEC nonstandard xDSL service arrangements (a term SWBT does not define) would demonstrate nondiscrimination. Moreover, CLECs have no incentive to promise customers service which they have any reason to doubt that they can deliver; the reputational damage is simply too great. CLECs do not gain from submitting trouble reports, they gain from providing service to customers. In sum, the quality of SWBT's provisioning of unbundled xDSL loops is insufficient to provide CLECs a meaningful opportunity compete. This performance shortcoming, combined with SWBT's unarguably poor performance on pre-ordering, ordering and installation, definitively establishes that SWBT does not provision unbundled xDSL loops in a manner that meets section 271's requirements.

2. SWBT's Advanced Services Affiliate Is Not Fully Operational Nor Can It Substitute For Nondiscriminatory Provision Of Unbundled xDSL Loops.

The TPUC and SWBT have implemented performance measures to ascertain SWBT's nondiscriminatory provision of xDSL loops. As demonstrated above, SWBT has singularly failed in provisioning xDSL loops in a nondiscriminatory manner. While the existence of a separate advanced services affiliate would certainly aid in the detection of discrimination, it does not in-and-of itself demonstrate or ensure nondiscriminatory access. That can only be done through an examination of reliable data as to SWBT's ability to meet its performance measure benchmarks. Here, those benchmarks are established and have been used for six months to measure SWBT's provisioning of a substantial number of xDSL loops. The Commission simply cannot accept the

creation of a separate advanced services affiliate to demonstrate nondiscrimination where the data compels the opposite conclusion.

Nevertheless, SWBT has not sufficiently demonstrated that its advanced services affiliate is truly separate. Indeed, at least two of the reasons that SBC Advanced Solutions Inc. ("ASI") is not sufficiently separate from SWBT illustrate why, as stated above, ASI can never really be separate enough from SWBT to (by itself) form the basis of a finding of nondiscriminatory availability of xDSL loops. For example, as pointed out by the DOJ and further explained in the Brown Supp. Aff. (¶ 16), SWBT will necessarily be involved with ascertaining the cause of a trouble report; indeed, SWBT may be the first party called when a customer reports a problem. See id. While SWBT is obligated to report to ASI and third parties in a nondiscriminatory manner, there is an irreducible risk that SWBT will inform its own affiliate as to trouble reports or actions taken by SWBT more quickly than it informs third-party CLECs. For example, as acknowledged by SWBT, some employees of ASI and SWBT will work in the same building. See Brown Supp. Aff. ¶ 14.

The inherently limited utility of separation as a means of ensuring nondiscrimination is all the more plain considering SWBT's response to the DOJ's concern that the manual work associated with processing, provisioning and maintaining xDSL-capable loops presents another irreducible opportunity for discrimination. SWBT responds that ASI will be using the same processes as the unaffiliated CLECs and that any such discrimination would be detected by performance measures. See Brown Supp. Aff. ¶ 17. In effect, SWBT concedes that the mere separation of the advanced services affiliate from SWBT neither demonstrates nor ensures

nondiscrimination. Rather, only consistent, nondiscriminatory performance as evidenced through performance measures can demonstrate and ensure nondiscriminatory performance.

SWBT makes another fundamental error when it attempts to defend its patently discriminatory provision of line sharing to ASI before line sharing is available to unaffiliated CLECs, as well as other practices and arrangements,²⁷ on the basis that the SBC/Ameritech Merger Order permits it to do so. See Supp. Letter at 15-16. This argument is patently incorrect. As discussed above, any attempt to rely on conditions imposed in the SBC/Ameritech Merger Order is contrary to the language of that decision, which states that the conditions "address potential public interest harms specific to the merger . . . not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market." SBC/Ameritech Merger Order ¶ 357.

Finally, as pointed out by the DOJ, ASI does not ensure that discriminatory actions will be detected because it does not provide all of SWBT's advanced services that are competitive with CLEC advanced services, such as ISDN and DS1. See DOJ March 20 Letter at 5-6. In response, Mr. Brown states that the "relevant issue is not whether ASI is offering the exact same complement of services as unaffiliated providers of advanced services," but whether ASI utilizes the same SWBT processes as unaffiliated CLECs. See Brown Supp. Aff. ¶ 15. Utilizing the same

²⁷ Mr. Brown provides a handy list of the Section 272 requirements from which it claims ASI is exempt pursuant to the SBC/Ameritech Merger Order. See Brown Supp. Aff. ¶ 14. This list demonstrates that ASI is far less separate than Section 272 affiliates and is, therefore, a less reliable mechanism for detecting discrimination. Yet the Commission has acknowledged that even the Section 272 affiliate rules leave substantial opportunities for masking discrimination and cross-subsidy. See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶¶ 179-181 (1996).

ordering and provisioning processes as unaffiliated CLECs is certainly important. Nevertheless, if SWBT is allowed to offer advanced services outside of ASI in competition with CLECs, it can more readily discriminate in favor of those services. Thus, to be "fully operational" ASI must offer all of SWBT's advanced services that are competitive with services offered by unaffiliated CLECs.

In any event, Mr. Brown is incorrect when he suggests that it is not relevant whether ASI offers the same complement of services as offered by unaffiliated CLECs. On the contrary, if ASI does not offer the same types of xDSL services as CLECs, it will not need to rely on the same inputs as CLECs, and SWBT can then discriminate against unaffiliated CLECs without harming ASI. This is illustrated by ASI's new-found "policy" of ordering at least 280 xDSL-capable loops from SWBT per month until it offers line sharing to unaffiliated CLECs. See Supp. Letter at 16; see also Brown Supp. Aff. ¶ 22. SWBT states that ASI will use the same processes as unaffiliated CLECs for pre-order information and will order xDSL loops in the hope that this will demonstrate nondiscrimination, at least until line sharing is made available to unaffiliated CLECs. In so doing, SWBT implicitly acknowledges that ASI is of little use as a tool to ensure nondiscrimination unless it relies on SWBT for the same inputs as competing CLECs.

Note, however, that even this "policy" of purchasing xDSL loops is fatally flawed as a tool to help ensure nondiscrimination, because ASI is not in fact dependent on unbundled xDSL loops as an input. For example, if ASI cannot provision a particular unbundled xDSL loop for one of its own retail customers in a timely fashion, ASI will simply use line sharing for that customer. Because ASI's service is not dependent upon the provisioning of an unbundled xDSL loop (unlike many data CLECs), the customer will receive the service requested as scheduled. In this manner,

ASI will be able to meet the 280 loop "policy" by only provisioning xDSL loops where it can be done without delaying service to its customers and, therefore, without harming its interests. And, in any event, SWBT only proposes to keep up this charade until line sharing is available to unaffiliated CLECs, at which point ASI will presumably no longer order xDSL loops. See Brown Supp. Aff. ¶ 22. This will again allow SWBT to perform poorly on xDSL loop provisioning without harming ASI.

3. SWBT's Reliance On The Covad/Rhythms Arbitration Award For Demonstrating That It Provides xDSL Loops On A Nondiscriminatory Basis Is Premature.

SWBT relies, in part, upon its implementation of the Covad/Rhythms arbitration award to demonstrate that it is providing xDSL loops on a nondiscriminatory basis, stating that it has "put in place the terms and conditions necessary, in the Texas PUC's view, to provide data CLECs nondiscriminatory access to unbundled loops." See Supp. Letter at 14-15. Moreover, SWBT has stated that it has "implemented every single one of the[] commitments by the date on which SBC filed this [its first] application."²⁸ However, SWBT's own documents show that full implementation of the arbitration award still has not occurred.

Although the arbitration award concludes that SWBT must provide CLECs with real-time access to mechanized loop make-up information contained in SWBT's electronic systems, SWBT concedes that this process has not yet been fully implemented and explains that "[t]he second

²⁸ Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Austin Schlick, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., CC Docket No. 00-4 at 2 (filed March 24, 2000). This letter from SWBT was in response to Covad's March 20, 2000 ex parte urging the Commission to verify SWBT's compliance with its December 16, 1999 commitments. See Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Florence M. Grasso, Covad, CC Docket No. 00-4 (filed March 20, 2000).

phase of implementation is scheduled for April 29, 2000"²⁹ In addition, in its original application, SWBT explained that it had committed to eliminating its Selective Feeder Separation ("SFS") binder group management system. However, as Sprint explained in its comments, Section 8.1 of the xDSL Attachment to the T2A states that SWBT may use "a selective feeder separation method to manage the spectrum."³⁰ As part of the revised application, affiant Nancy Meierhoff claims that SWBT has been in compliance with its SFS commitments since before it filed its original application,³¹ although she does not explain whether the contrary wording in the xDSL Attachment to the T2A has been deleted to reflect SWBT's commitment. The failure to address the concerns raised by Sprint's Petition counsels in favor of Commission verification of SWBT's compliance with the arbitration award.

The arbitration award requires SWBT to ensure that CLEC deployment information remains "confidential from SWBT's retail operations, any SWBT affiliate, or any other CLEC."³² Indeed, the Arbitrators found "the disclosure of CLEC deployment information by SWBT to its retail operation to be grave," and concluded that disclosure of such information would be "anticompetitive, discriminatory and prejudicial action by SWBT against its competitors," and

²⁹ See Chapman/Dysart Supp. Aff. at ¶ 97.

³⁰ See Petition at 37.

³¹ See Meierhoff Aff. ¶¶ 4, 6.

³² Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company; Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket Nos. 20226, 20272, Arbitration Award, slip. op. at 55 (TX PUC, Nov. 30, 1999).

would "threaten the further development of a competitive advanced services market in Texas."³³

Consequently, the implementation of mechanisms designed to prevent such injurious behavior is critical to the development of advanced services competition in Texas. SWBT has not yet fully implemented such mechanisms. SWBT has filed its protection plan with the TPUC, but the plan still has not received TPUC approval.³⁴ Hence, the record does not permit the Commission to discern whether SWBT's protection plan is sufficient.

Even where SWBT asserts that an arbitration award provision has been implemented, experience suggests that the Commission should verify that implementation has been accomplished properly. SWBT's history in Texas is characterized by the repeated and persistent failure to implement the inputs required by section 271 to allow other carriers a meaningful opportunity to compete. Indeed, such failure was part of the basis for the Department of Justice's criticisms of SWBT's first Texas 271 Application.³⁵ In light of SWBT's history of substandard performance and the specific inconsistencies in SWBT's revised 271 application concerning the degree to which the arbitration award has been fully implemented, the Commission must insist upon quantifiable proof of complete implementation of SWBT's legal obligations to provide xDSL loops on a nondiscriminatory basis under the arbitration award.

³³ Id. at 55-56.

³⁴ See Chapman/Dysart Supp. Aff. ¶ 98.

³⁵ DOJ Eval. at 23 ("Taken as a whole, these performance reports show a service environment in which CLECs attempting to compete against SBC's retail DSL services are seriously disadvantaged at present by SBC's inadequate wholesale performance, and may well face greater disadvantages in the future if SBC's performance continues to decline in the face of higher volumes of CLEC orders.").

B. SWBT Does Not Provide Coordinated Cutovers In A Manner That Allows An Efficient Competitor To Compete.

SWBT claims that its performance with regard to coordinated line conversions (or "hot cuts") is consistent with a finding that it provides nondiscriminatory access to unbundled loops pursuant to checklist item (iv). See Supp. Letter at 9. In order to carry this burden, the New York Order makes clear that a BOC must demonstrate an ability to perform this function with sufficient timeliness while strictly limiting both service outages and installation trouble reports such that the BOC "offer[s] efficient competitors a meaningful opportunity to compete." New York Order ¶ 298. As demonstrated by Sprint in its Petition and Reply, SWBT failed to show that it had met this burden, and its effort to resuscitate its failed demonstration in the Supp. Letter is equally unavailing.³⁶

1. The Reliability Of SWBT's Data Has Been Called Into Question.

As an initial matter, data reliability for hot cut performance remains an area of sharp dispute. For example, AT&T has informed the Commission that neither AT&T's November and December outage rates for Coordinated Hot Cuts ("CHC") nor AT&T's January and February

³⁶ SWBT attempts to minimize the importance of its hot cut provisioning by claiming that "only about 10 to 15 percent of unbundled local loops are provisioned using the hot cut process. CLECs overwhelmingly are using the UNE Platform rather than hot cut, new, or moved loops." Supp. Letter at 8. While UNE-P is certainly important, particularly as a market entry tool, CLECs have strong incentive to transition to unbundled loops as quickly as their customer base in a given central office will economically justify switch collocation. By doing so, CLECs gain much greater control over the services that they are capable of offering end-users, including vertical features. Thus, UNE-P performance cannot substitute for nondiscriminatory unbundled loop provisioning. In any event, the DOJ has noted that SBC's UNE-P performance "has been flawed in a number of respects." DOJ Eval. at 50.

outage rates for CHC conversions and Frame Due Time ("FDT") cutovers have been reconciled.³⁷ The November and December outage rates for AT&T's CHC hot cuts have not been reconciled because AT&T and SWBT have been unable to determine the total number of CHC hot cuts ordered and loops completed in November and December, which leaves them unable to accurately report the percentage of orders or loops which experienced an outage. See id. at 5. Indeed, SWBT's hot cut data has been restated, updated or corrected several times in these proceedings, creating a moving target that has, in several instances, included erroneous information. See id. at 2-3; see also AT&T March 30 Letter at 2-4. And, these disputes continue to plague SWBT, as Allegiance and SWBT continue to dispute the percentage of Allegiance hot cuts that are performed late. Compare Allegiance Telecom, Inc. March 24 Letter at 1-2 with Conway/Dysart Supp. Aff. ¶ 44. At a minimum, these facts call into question whether the Commission can rely on the data submitted by SWBT in the Supp. Letter.

Notably, data reliability is a chronic problem for SWBT. See, e.g., AT&T March 30 Letter at 2-4. As explained in Sprint's Petition, the only reliable data on hot cuts placed before the Commission in the first Texas application was the data reconciled by SWBT and AT&T pursuant to a TPUC order. See, e.g., Petition at 50. The reconciled data differed so dramatically from that sponsored by SWBT that the credibility of SWBT's self-reported data cannot be accepted at face value. Id. at 57.

³⁷ See AT&T March 13 Letter at 2, n.3. The CHC method involves direct coordination between the SWBT technician performing the cut and the CLEC at the time the cut is performed, while the FDT method relies on a pre-arranged schedule to accomplish the same result without direct coordination at the time of the cutover.

Finally, Sprint notes that the TPUC has required that SWBT submit to the TPUC its raw performance measure data for hot cuts for all CLECs from December 1999 to February 2000, and that SWBT submit to each CLEC raw performance measure data for hot cuts for that CLEC's orders. See Conway/Dysart Supp. Aff. ¶ 35. This data is to be reconciled sometime before April 14, 2000. Id. Thus, until and unless SWBT's self-reported hot cut data is proven to be reliable, the Commission cannot, with any degree of confidence, reach a conclusion as to whether SWBT's hot cut performance is sufficient to provide CLECs a meaningful opportunity to compete. Nevertheless, the data as submitted by SWBT fails to meet the statutory requirements.

2. SWBT's Hot Cut Performance Does Not Meet The Standard Articulated In The New York Order.

SWBT claims that it "is satisfying the Commission's standards in each of the three areas of hot-cut performance identified in the New York Order," and that, on that basis, "[h]ot-cut performance could hardly be a basis for finding that SBC fails to provide nondiscriminatory access to unbundled loops under Checklist Item (iv)." Supp. Letter 9. SWBT can make this claim only by effectively ignoring measures of timeliness other than the cutover interval (PM 114.1) and by giving short shrift to its service outage and trouble report performance for cutovers. And, even when these factors are ignored, SWBT's timeliness performance does not demonstrate nondiscriminatory access; indeed, the TPUC's performance measure for cutover intervals (PM 114.1) does not appear to be directly comparable to that employed in New York, and SWBT falls far short of the interim benchmark established by the TPUC for PM 114.1. By asserting compliance without appropriately accounting for these factors, SWBT is laboring under a fundamental misapprehension of the Commission's hot cut analysis in the New York Order.

In ruling on Bell Atlantic's compliance with this checklist item in New York, the Commission examined the percentage of on-time hot cut performance as well as the quality of the unbundled loops provisioned through those hot cuts. See New York Order ¶¶ 299-303. The Commission concluded that Bell Atlantic's record of "on-time hot cut performance at rates at or above 90%,³⁸ in combination with . . . fewer than five percent of hot cuts result[ing] in service outages and . . . fewer than two percent of hot cut lines . . . report[ing] installation troubles, [was] sufficient to establish compliance with the competitive checklist." Id. ¶ 309. Thus, Bell Atlantic's hot cut performance in all relevant areas, and in particular its performance on hot cut outages and trouble reports, led to the Commission's ultimate conclusion that an efficient competitor would have a meaningful opportunity to compete. The New York Order does not stand for the proposition that meaningful performance measures established by a PUC can or should be ignored in assessing hot cut performance. Yet, this is precisely what SWBT does when it attempts to sweep under the carpet its performance on premature and delayed cutovers. Nor does the New York Order in any way support the notion that the outage and trouble report data for one method of performing cutovers -- and in particular the method apparently preferred by SWBT for most cutovers (as discussed immediately below) -- can be ignored merely because another method is available. See Supp. Letter at 10. Once these facts are appropriately weighed, SWBT's performance for hot cut timeliness, trouble reports and service outages for December 1999 through February 2000 clearly establishes that SWBT does not provide CLECs a meaningful opportunity to compete.

³⁸ "On-time" varied from one to eight hours, depending on the number of lines involved. New York Order ¶ 292.

Before examining the data reported by SWBT, it is important to recognize that the hot cut data relied on by SWBT in the Supp. Letter differs in format in one very important way from the data relied on in SWBT's first Texas 271 application. The Supp. Letter and the Conway/Dysart Supp. Aff. report disaggregated data for hot cuts to separate the data for conversions accomplished via the CHC method from the FDT method. SWBT prefers to use the CHC method for conversions involving more than 20 lines and the FDT method for cutovers involving fewer than 20 lines. See Conway Aff. ¶ 79. Significantly, SWBT has encouraged CLECs to use FDT for smaller-volume loop cutovers³⁹ because CHC is apparently too resource-intensive to support commercial levels of demand for low-volume loop orders and because transition to FDT would purportedly alleviate CHC capacity constraints. See AT&T DeYoung Decl. ¶¶ 45-47. And, SWBT's recent data indicates that CLECs increasingly rely on the FDT method for unbundled loop cutovers,⁴⁰ and that this trend is likely to continue given that many of the CHC hot cuts performed by SWBT today apparently could be performed using FDT.⁴¹

These facts suggest that FDT hot cuts will be increasingly important in the development of local competition in Texas. SWBT apparently only has data (to date) breaking out its hot cut performance based on CHC and FDT for the months December 1999 through February 2000. As demonstrated below, SWBT's performance for FDT hot cuts for all performance measures for

³⁹ See id.

⁴⁰ SWBT reports that it attempted 2,129 CHC cutovers and 2,083 FDT cutovers in December 1999 compared to 1,896 CHC cutovers and 2,258 FDT cutovers in February 2000. See Conway/Dysart Supp. Aff. ¶ 9.

⁴¹ A sample of SWBT CHC orders from August to October 1999 indicated that CHC hot cuts average three to four lines per order. Dysart Aff. ¶ 653.